AJN

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4578 OF 2005

Bhagawat Vithoba Kapse ... Petitioner

Vs.

Shahu Galande ... Respondent

Ms. P.A. Birje h/f. Ms. Aniketa A. Sawant for the petitioner.

Mr. Ravi Rattesar h/f. Mr. M.R. Deshpande for the respondent.

CORAM: SMT. RANJANA DESAI, J.

DATED: 23RD AUGUST, 2005.

P.C.:-

1. The petitioner is the original defendant. The plaintiff has filed a suit against the defendant praying for an order of injunction restraining the defendant from disturbing the possession of the plaintiff in the suit property viz. Gat No.111/1 admeasuring 32 Ares of Ambabaichi Wadi, Taluka Barshi, Dist. Solapur. In that suit, the defendant filed an application for framing the issue of jurisdiction as a preliminary issue. That application is rejected by the trial court by its order dated 15/4/2005. Therefore, this writ petition.

2. I have heard, at considerable length, Ms. Birje, the learned counsel appearing for the petitioner/defendant. The learned counsel drew my attention to an application

made by the petitioner/defendant to the Settlement Commissioner, Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (for short, "the said Act") for effecting the correction in the record of rights and/or 7/12 extract of land at Gat No.111/1 admeasuring OH-32R, assessed at Rs.66 Ps. of village Ambabaichiwadi, Taluka Barsi. The learned counsel contended that Narayan - the grandfather of the defendant had acquired 1/3rd share in Survey No.60. The said 1/3rd share of Survey No.60 has been divided into three parts bearing Survey Nos.60/1, 60/2 and 60/3. Consolidation Scheme was implemented in village Ambabaichiwadi and in the said Consolidation Scheme, Survey No.60/1 was given Gat No.116 and Survey No.60/2 was given Gat No.116 and the remaining third part of Survey No.60/3 has been again divided into five parts and the said five parts have been given Gat Nos.111, 112, 113, 114 and 115. Thereafter, in the family partition, Gat No.111 has been divided into two parts i.e. Gat No.111/1 and 111/2 by Narayan - the grandfather of the defendant and Gat No.111/2 has been allotted to the share of Bhagwan, who is his illegitimate child and Gat No.111/1 has been allotted to the defendant. According to the petitioner/defendant, inspite of this fact, instead of showing Gat No.111/1 in the name of the defendant, it has been shown in the name of Bhagwan, the illegitimate child of his grandfather Narayan and, therefore, the above mentioned application was made to the Settlement Commissioner, praying that the name of Bhagwan be deleted and the defendant’s name be

entered in the record of rights of Survey No.111/1. The learned counsel contended that since the Settlement Commissioner is considering whether there is any error in the record of rights in view of section 36(A) of the said Act, the instant suit is not maintainable and, therefore, the learned judge should have framed the issue of jurisdiction and tried it as a preliminary issue.

3. I am unable to agree with the learned counsel. The trial court has rightly observed that neither in the written statement nor in the affidavit, the defendant has affirmatively taken up the contention that the trial court has no jurisdiction. In any case, the application filed before the Settlement Commissioner is with regard to the alleged error committed in the record of rights and that is a dispute between the defendant Bhagawat and Bhagwan, the illegitimate son of the defendant's grandfather. In this suit, the respondent/plaintiff's case is that he is in possession of the suit premises. The present suit is between the respondent/plaintiff Shahu Galande and the petitioner/defendant Bhagawat Vithal. It is a suit only for injunction based on possession. Besides if there are no pleadings, issue cannot be framed at this stage. The application is rightly rejected. No interference is necessary. Hence, the petition is rejected.

(SMT. RANJANA DESAI, J.)